Supreme Court, U. S.
FILED
AUG 11 1976
MICHAEL RODAK, JR., CLERK

No. 75-1559

# In the Supreme Court of the United States

OCTOBER TERM, 1976

MILTON PARNESS AND
BARBARA PARNESS, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. A, pp. 1a-9a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 7, 1976, and a petition for rehearing was denied on February 26, 1976. On March 18, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until April 26, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioners were entitled to a new trial under Fed. R. Crim. P. 33 on the basis of allegedly "newly discovered" evidence.

2. Whether, in the absence of a focused defense request, petitioners were entitled to a new trial because of the prosecution's failure to disclose allegedly exculpatory evidence at trial.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on two counts of causing the interstate transportation of converted property and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314. Petitioner Milton Parness also was convicted on one count of acquiring control of an enterprise in interstate or foreign commerce through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(b). He was sentenced to concurrent terms of ten years' imprisonment and a $55,000 fine. Petitioner Barbara Parness was fined $6,000, and execution of a two-year sentence of imprisonment was suspended in favor of three years' probation. The district court denied two successive post-trial motions for a new trial based upon allegedly newly discovered evidence. The court of appeals affirmed. *United States* v. *Parness*, 503 F. 2d 430, certiorari denied, 419 U.S. 1105.

Petitioners then filed a third motion for a new trial on the grounds of allegedly newly discovered evidence and the prosecution's alleged failure to disclose material, exculpatory evidence. They asserted that "the testimony of the prosecution's witness-in-chief was false as to material matters" and "that at the time of trial the United States



Attorney knew or should have known of material evidence favorable to the defendants which was not disclosed or made available to the defendants" (Pet. App. A, p. 2a). The district court heard argument on petitioners' motion limited to the issue whether an evidentiary hearing was necessary. After consideration of the briefs and supporting affidavits, the court denied the motion for a new trial (Pet. App. A, pp. 2a-9a). The court of appeals affirmed on the basis of the district court's opinion, holding that it had applied the proper legal standards and that its findings of fact were not clearly erroneous (Pet. App. B).[1]

As set forth in the opinion of the court of appeals on direct appeal (503 F. 2d 430, 433-438) and in our brief in opposition to petitioners' original petition for a writ of certiorari (No. 74-274, O.T. 1974, pp. 3-7), the evidence showed that during the years 1970-1971, petitioners defrauded Alan Goberman of his 90.5 percent stock holdings in a multi-million dollar gambling casino-hotel corporation in the Netherlands Antilles. Through one of his corporations, Olympic Sports Club, Inc., petitioner Milton Parness agreed with Goberman to assume sole responsibility for organizing gambling junkets to the casino and collecting and remitting to the hotel company the gamblers' initial gaming deposits and, after their return to the United States, any additional debts they may have incurred. Petitioners illegally diverted to their own account a large portion of the receipts they collected. In January

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[1]On January 12, 1976, the court of appeals denied petitioners' motion to recall and stay the mandate, noting that on appeal from the denial of the new trial motion, it had found petitioner's "claims of error to be so frivolous that we ordered that the mandate issue forthwith" (Pet. App. C, p. 14a). It characterized that motion as "the latest in a series of maneuvers to avoid surrendering" to serve a valid sentence (Pet. App. C, p. 13a).

1971, they loaned $160,000 of these converted funds back to Goberman to prevent the casino from defaulting on its indebtedness, taking a pledge of Goberman's entire stock interest in the hotel company as security for their loan. Petitioners made it impossible for Goberman to obtain the funds necessary to repay the loan by continuing to divert or withhold part of the outstanding gambling receipts. Upon Goberman's eventual default in March 1971, petitioner Milton Parness foreclosed on the loan and took control of the hotel company.

To disguise the scheme by which he had obtained control of the casino, Milton Parness had false documents prepared showing that a newly acquired shell company (Aliter Holdings) had provided the funds for the loan to Goberman. Although petitioner Barbara Parness testified before the grand jury that the money for this loan had come from the nominal head of Aliter Holdings, she knew that Olympic Sports Club, and not that individual, had supplied the money. In order to fund the loan to Goberman, she had obtained two cashier's checks from a New Jersey bank by surrendering $99,000 in cash and an Olympic check for $61,000.

In support of their third new trial motion, petitioners argued that the depositions of Goberman and John Blandino taken in a subsequent civil action instituted by Goberman against petitioners in the United States District Court for the District of New Jersey under 18 U.S.C. 1964 demonstrated that Goberman had testified falsely at their trial concerning the amount of gambling debts petitioner Milton Parness owed the hotel company but failed to remit between January and March 1971. They also contended that certain of Goberman's statements to the district court in that suit showed the existence of a previously undisclosed promise



by the government that, in return for Goberman's testimony at petitioners' trial, it would assist him in recovering ownership of the casino, which had been forfeited to the government of the Netherlands Antilles (Pet. App. A, p. 8a). Finally, they claimed that 24 letters written by Goberman to various government employees, chiefly special attorneys of the Department of Justice, before their trial contained further evidence of a government promise to aid Goberman in recovering both the casino and $60,000 in gambling debt collections which had been seized by I.R.S. agents as they were being delivered to Milton Parness.[2] They contended that the prosecution's failure to disclose this information to the defense at trial for use in impeaching Goberman's credibility constituted a breach of its obligations under the Jencks Act, 18 U.S.C. 3500, and *Brady* v. *Maryland*, 373 U.S. 83.

The district court held that the statements in Goberman's depositions allegedly showing that he had misstated the amount of debt collections Milton Parness owed the hotel company at petitioners' trial were not "newly discovered" evidence under Fed. R. Crim. P. 33. It found that the facts and business records underlying both Goberman's trial estimate of the overdue collections and his purportedly differing estimate in his deposition were fully known to or were available to petitioners at

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[2]Goberman had annexed several such letters to papers he filed in connection with a second civil suit he had brought against the government in the United States District Court for the Eastern District of Pennsylvania seeking recovery of these funds. After petitioners filed their third new trial motion, the government discovered additional letters in the Washington administrative files of the Strike Force which had handled petitioners' prosecution. It submitted those letters to the district court, together with the affidavits of the four government attorneys who had dealt with Goberman at various times, in which they denied the existence of any such promises.

trial (Pet. App. A, pp. 3a-5a). The court also held that nothing in the various letters suggested the existence of a government promise to help Goberman recover the $60,000 or the casino (Pet. App. A, p. 8a). It dismissed Goberman's more recent statements as at best "ambiguous" on this issue and displaying a lack of comprehension of the status of the casino (*ibid.*). Finally, the court found that, even assuming that Goberman's letters to the government officials constituted Jencks Act or *Brady* material, their nondisclosure by the prosecution at trial was inadvertent (*ibid.*). It found that, even if developed by skilled counsel, this material could not have induced a sufficient doubt in the minds of the jury to have avoided conviction and therefore held that petitioners were not entitled to a new trial (Pet. App. A, pp. 8a-9a).

## ARGUMENT

Petitioners contend that they are entitled to a new trial because newly discovered evidence shows that the chief prosecution witness testified falsely regarding "the central factual issue" in the case (Pet. 10)—whether petitioners obtained the $160,000 lent to Goberman by wrongfully converting the casino's debt collections. They claim that the falsity of Goberman's testimony was known, or should have been known, to the prosecution and that the government deliberately withheld exculpatory letters from the defense which would have exposed his perjury. They also contend that the nondisclosed letters contain evidence of government promises to assist Goberman, evidence which, if disclosed at trial, probably would have produced a different verdict.

1. A defendant who seeks a new trial under Rule 33 must satisfy the district court that material evidence has been newly discovered which could not, with the exercise of due diligence, have been obtained beforehand for use



at trial. *E.g., United States* v. *Costello*, 255 F. 2d 876 (C.A. 2), certiorari denied, 357 U.S. 937. That showing has not been made here.

a. Goberman estimated at trial that, based on the casino's worksheets and other records (Tr. 471, 482; Govt. Exs. 167-177), Milton Parness owed him approximately $400,000 in gambling receipts at the time petitioners loaned him the $160,000 (Pet. App. A, pp. 3a-4a). Contrary to petitioners' assertion (Pet. 10-11), Goberman's post-trial statements do not show that Milton Parness owed the casino only $2,000. Petitioners' calculation is based on the erroneous premise that Goberman subsequently admitted that the gross debt due the casino was $233,000, the amount reflected on the face of the worksheets. However, in his deposition, Goberman repeatedly emphasized that the worksheets were an incomplete record and that his original estimate had been based on other documents not then available to him (J. 114, 123-124, 127, 192).[3] Petitioners also contend (Pet. 11) that Goberman conceded in his deposition that his original estimate improperly failed to credit Milton Parness with an additional $139,000 in remittances to the casino; however, Goberman actually admitted that he had not deducted two checks totaling $17,300 in that calculation (J. 180). The evidence before the jury showed that Olympic remitted more than $500,000 in gambling debt collections to the casino between January and March 1971. At his deposition, Goberman simply was unable to determine, on the basis of the records then available to him,

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[3]Indeed, defense counsel relied heavily on this concession to impeach Goberman's credibility, arguing that the lack of documentary support showed that his estimate of the gambling debt due was pure speculation (Tr. 1618-1619).

"J." refers to the Joint Appendix in the court of appeals.

whether he had considered each of the other checks upon which petitioners rely (J. 36-38) in reaching his original estimate of the sums withheld.

Goberman testified at trial that Parness was entitled to deduct certain commissions from the gambling debts he collected (Tr. 27-28, 453-454, 459, 485-487), but petitioners' counsel never asked Goberman to determine the amount deductible, which they now claim totaled $85,000 (J. 26). Even accepting this calculation, Goberman's post-trial statements demonstrate that the amount of gambling receipts petitioners withheld from the casino was more than ample to fund the $160,000 loan. In the absence of any other credible explanation as to the source of that cash, the inescapable conclusion remains "that Parness * * * withheld marker collections and* * * used the proceeds of such collections * * * to acquire Goberman's interest" in the casino (503 F. 2d at 437).

In any event, none of the material upon which petitioners' Rule 33 motion rests was newly discovered. The district court noted that "[petitioners'] counsel cross-examined Goberman at length [during the trial] with respect to his estimates and used the [work sheets] in his summation" (Pet. App. A, p. 4a) Petitioners concede (Pet. 23) that they could have cross-examined Goberman on the discrepancy in his estimate of the gambling receipts due and the amount shown on the face of the worksheets. To the extent Goberman's trial and post-trial estimates varied, petitioners suggest no reason why, with minimal diligence, they could not have asked Goberman the same questions at trial—and thus obtained a lower estimate—as they later asked at his deposition.

Similarly, Goberman's post-trial acknowledgment that Milton Parness was entitled to deduct certain commissions from the gambling debt collections was not newly



discovered, because Goberman had made the same admission on both direct and cross-examination at trial (Tr. 27-28, 453-454, 459, 485-487). In addition, petitioners were the recipients of these commissions and thus had personal knowledge that Goberman's trial estimate was a gross figure subject to adjustment (Tr. 551; Pet. App. A, p. 4a). Nor does Goberman's deposition testimony that Olympic remitted certain payments to the casino during the period in which other gambling receipts were being withheld constitute newly discovered evidence. The checks upon which this claim is based (Pet. 11) were reflected in material furnished the defense prior to trial (Govt. Ex. 155). As the district court properly found (Pet. App. A, pp. 4a-5a), petitioners' counsel utilized this material in cross-examining Goberman and in his summation (Tr. 1628-1629), but petitioners failed to confront Goberman with any of the individual checks until his deposition. Furthermore, since these checks were issued by Olympic Sports, Milton Parness' captive entity, petitioners had effective knowledge of their existence at trial.

Therefore, the district court correctly held (Pet. App. A, pp. 4a-5a) that since petitioners had prior knowledge of the essential facts regarding the worksheets, the commissions process, and the remittance checks, their failure to utilize that information at trial to attack Goberman's estimate of the gambling debts due the casino constitutes a lack of reasonable diligence that bars the award of a new trial. See, *e.g.*, *United States* v. *Slutsky*, 514 F. 2d 1222 (C.A. 2); *United States* v. *Ruggiero*, 472 F. 2d 599 (C.A. 2), certiorari denied, 412 U.S. 939; *United States* v. *Teague*, 445 F. 2d 114 (C.A. 7); cf. *United States* v. *Ross*, 511 F. 2d 757 (C.A. 5).

b. Petitioners further contend (Pet. 23-24) that Goberman's assertion in the civil suits that he is entitled to the $60,000 in cash seized by the I.R.S. undermines two

"fundamental assumptions" upon which the court of appeals relied in affirming their convictions—namely that Milton Parness had exclusive control of the casino's debt collections and that the $60,000 was destined for Parness when intercepted. However, the court of appeals did not refer to the seizure of this money in concluding that petitioners were the casino's exclusive debt collector, had illegally converted its debt collections and had used those proceeds to loan Goberman the $160,000 (503 F. 2d at 433-435). The court relied on the seizure merely to explain why petitioner Barbara Parness had utilized a readily traceable Olympic check for $61,000 in funding part of the Goberman loan rather than relying on undetectable cash (503 F. 2d at 436). Moreover, $60,000 is a small fraction of the total debt Parness failed to deliver to the casino. Regardless of the person for whom the messenger was acting when the I.R.S. intervened, such a relatively insignificant discrepancy in Goberman's testimony regarding the amount of funds due would not affect petitioners' liability for having converted substantial sums of money.

In any event, Goberman's assertion of the right to possession of the $60,000 does not constitute "newly discovered evidence" entitling petitioners to a new trial. Goberman testified at trial that he had sworn in an affidavit that "Mr. Norber was bringing the money to [me]" (Tr. 476-477). Petitioners were then aware that Goberman asserted that the $60,000 belonged to his corporation and that he intended to "mak[e] a claim for it * * * *" (Govt. Ex. 3506). His actual post-trial statement was that the messenger "was bringing $60,000 from Detroit to New York—to be delivered to me * * * *" J. 594). This statement is not inconsistent with his trial testimony. Nothing in Goberman's later statements or letters to the government contradicts his contention at trial that Parness "was responsible for the deliverance



of the [gambling] junkets," and that while "there were other junketeers * * * they had to work through Mr. Parness" (Tr. 59). Thus, this issue also was raised during Goberman's testimony at trial, and if petitioners failed to develop the issue sufficiently at that time, that is no basis for a belated motion under Rule 33.[4]

2. Petitioners contend (Pet. 18-20) that Goberman's post-trial statements contradict his earlier testimony on certain issues critical to their guilt or innocence and thus demonstrate that he committed perjury at their trial. But, as we have already shown, Goberman's submissions and deposition testimony in the two civil actions were not inconsistent with his trial testimony. The differences, if any, in his later allegations reflected the differing factual context in which the particular questions he answered were presented. In essence, this allegation of perjury restates, in the form appropriate for a motion for post-trial relief, petitioners' consistent objection that their convictions rest on Goberman's biased and untrustworthy testimony. That issue was fully argued to the jury, and the documentary evidence which underlies Goberman's testimony was discussed at length in his cross-examination and was available to the jury in its deliberations. It resolved the question of the weight to be afforded Goberman's testimony adversely to petitioners, and the courts below properly refrained from reconsidering that issue.[5]

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[4]Goberman's evident confusion about the status of the casino (Pet. App. A. p. 8a), which he had forfeited to the government of the Netherlands Antilles for default in the payments on its first mortgage construction loan, and his ambiguous statements concerning the prosecution's expression of sympathy with his plight provide even a lesser justification for the award of a new trial.

[5]Contrary to petitioners' allegation (Pet. 18-19), this case presents no occasion for review of the alleged conflict between *United States* v. *Stofsky*, 527 F. 2d 287 (C.A. 2), petition for a writ

3. There is no greater merit in petitioners' claim (Pet. 11-12, 18) that the government breached its obligations under the Jencks Act and *Brady* v. *Maryland*, *supra*, by failing to disclose twenty-four letters that Goberman wrote to various government officials between December 1972 and January 1974.

In *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, this Court held that absent a specific prior production request,[6] a defendant is not entitled to a new trial on account of the prosecution's failure to disclose exculpatory evidence in its files unless the additional evidence creates a reasonable doubt about his guilt.[7] Here, the district court thoroughly considered

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of certiorari pending, No. 75-1554, and *Larrison* v. *United States*, 24 F. 2d 82 (C.A. 7), and its progeny. Prior to this Court's decision in *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, when the reviewing court determined that a witness had committed perjury, *Larrison* permitted the award of a new trial on a lesser showing of materiality than under the normal Rule 33 standard. Assuming that this rule is consistent with *Agurs*, it is inapplicable on its face because the courts below did not find Goberman perjured himself. Moreover, as the *Stofsky* court noted, while the courts of appeals may have formulated different verbal standards for awarding new trials upon discovery of perjury, those tests as applied produce similar results (527 F. 2d at 246). In any event, petitioners were not entitled to relief under either test, as the district court's decision properly reflects. Thus, this case does not provide a suitable vehicle to resolve this putative conflict.

[6]Petitioners did not specifically request production of these letters; rather, they submitted a *Brady* request "for disclosure of all exculpatory material" (Brief for Appellant—Milton Parness) in the Court of Appeals, p. 7), which is the functional equivalent of no request at all. See *United States* v. *Agurs*, *supra*, slip op. at 9. Thus, this case presents no occasion to consider the proper test of materiality for nondisclosed evidence reasonably falling with the ambit of a focused request.

[7]The courts below found that the government's failure to disclose these letters at trial was inadvertent (Pet. App. A, p. 8a; Pet. App. B, p. 11a). Given the insubstantial nature of the subject matter of the letters, that decision is amply justified. However, contrary to petitioners' argument (Pet. 13-18), under *United States* v. *Agurs*, *supra*, slip op. at 12-13, the defendant's right to a new trial is determined by the evidentiary significance of the nondisclosed evidence and not by the prosecution's willfullness or negligence in failing to produce it. Thus, the district court was not required to hold an evidentiary hearing on the issue of prosecutorial inadvertence.



the nondisclosed evidence and concluded that there was no significant chance that these letters, even if utilized by skilled counsel, " 'could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction' " (Pet. App. A, p. 9a)—a standard more favorable to the petitioners than the test adopted in *Agurs* (see Marshall, J., dissenting, slip op. 5-6). The court of appeals held that the district court's finding was not clearly erroneous (Pet. App. B, p. 11a). Accordingly, this essentially factual issue does not warrant further review.

As the district court properly found (Pet. App. A, p. 8a), nothing in those letters suggests that the government promised to assist Goberman in recovering the casino or the moneys seized by the I.R.S. Goberman's letters demonstrate little more than that the government supplied him with the appropriate form for filing a claim under 18 U.S.C. 1963(c), which provides for forfeiture of property acquired in violation of the anti-racketeering statute, but "making due provision for the rights of innocent persons" (J. 486-487, 493, 599, 601).[8] Far

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[8]In any event, this information could not constitute newly discovered evidence. Petitioners' counsel was well aware of the operation of Section 1963(c)—he even discussed the question of its applicability to property outside the territorial jurisdiction of the United States (such as the casino) with the trial judge. As the district court properly found (Pet. App. A, p. 7a), "the statute provided adequate basis for cross-examination of Goberman as to

from evidencing his belief that the prosecution would help him recover those funds, the letters show Goberman's increasing conviction that the government was indifferent to or actively impeding his claim (J. 572, 582, 600, 607, 609). Indeed, in mid-1973, Goberman filed suit against the United States in the United States District Court for the Eastern District of Pennsylvania to obtain recovery of the $60,000 (see n. 2, *supra*). Thus, these letters cannot be said to cast reasonable doubt on petitioners' guilt.

Petitioners also suggest that disclosure of the letters would have enabled them to attack Goberman's motives for testifying for the prosecution. However, their counsel fully explored Goberman's motives at trial and elicited forceful evidence of bias. Goberman testified that he formerly had been a millionaire but had been reduced to poverty by petitioners' activities, for which he blamed Milton Parness personally (Tr. 162). Petitioners' counsel also cross-examined Goberman regarding his indictment for tax evasion during the government's investigation of their activities. He argued to the jury that the government had indicted Goberman to compel him to testify against petitioners in order to protect his own self-interest (Tr. 1568-1569). Counsel then read the jury the terms of Goberman's plea bargain, which provided for a maximum sentence of four years' probation (Tr. 1571-1572).[9]

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whether he expected to get the Casino-Hotel back as an 'innocent person' and for argument before the jury that he was testifying for that purpose."

Petitioners' counsel also was aware (Tr. 1344) that Goberman had a strong financial incentive to testify against petitioners, for their conviction on the Section 1962 count would greatly assist his prospect of recovering treble damages from petitioners in an action under 18 U.S.C. 1964(c).



Thus, even if the nondisclosed letters had contained some evidence of an expectation of government assistance with his recovery claim, they would merely have been cumulative of other potent evidence impeaching Goberman's credibility already before the jury and could not have created a reasonable doubt as to petitioner's culpability.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1976.